AIA BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICIAL APPLICATION NO: WA-25-297-10-2020]
30 SEPTEMBER 2021

Abstract – *The courts' jurisdiction to hear a judicial review application is not excluded despite the existence of a statutory appeal remedy under the Income Tax Act 1967 when the application shows strong merit. The courts are inclined to grant judicial review more so when the threshold for granting of leave for judicial review is very low and prima facie has been shown that the application is not frivolous or vexatious.*

ADMINISTRATIVE LAW: *Judicial review – Leave – Application for – Application for judicial review against decision of Director General of Inland Revenue ('DGIR') – DGIR concluded that reinsurance commission and profit commissions constituted income and subject to tax – Unit linked funds from computation of set-off for tax charged on actuarial surplus – Imposition of additional taxes and penalties for years of assessment – Whether applicant adversely affected by DGIR's decision – Whether application frivolous or vexatious – Whether DGIR acted legally – Whether there were special circumstances warranting stay – Income Tax Act 1967, ss. 60(8) & 110B*

REVENUE LAW: *Income tax – Taxability – Reinsurance commission and profit commissions – Whether constituted income and subject to tax – Income Tax Act 1967, ss. 60(8) & 110B*

The applicant, a company running the business of life and general insurance, bought insurance policies known as reinsurance from reinsurance companies. Following an audit, the respondent discovered that the reinsurance commissions and profit commissions (rebates) received by the applicant from the reinsurance companies constituted income which was subject to tax under s. 60(8) of the Income Tax Act 1967 ('ITA'). The respondent requested for sample profit commission agreements, annual profit commission statements and a complete list of the profit commission receipts. The applicant replied with an explanation. The respondent maintained its earlier finding and sought to exclude the unit linked funds from the computation of the set-off for tax charged on actuarial surplus under s. 110B of the ITA. The applicant responded again with an explanation but the respondent proceeded to issue a notice of additional assessment and imposed a 45% penalty on additional income from the profit commission and reinsurance commission received by the applicant. The applicant was required to pay the sum of RM92,553,840.66 as additional taxes and penalties for years of assessment

2015, 2016 and 2017 ('respondent's decision'). Hence, the present application by the applicant for leave for judicial review against the respondent's decision. In support of the application, the applicant argued that the decision was infirmed by illegality, unreasonableness and was in excess of the respondent's authority as: (i) there was a meeting held between the representatives from the Life Insurance Association of Malaysia ('LIAM'), the Malaysian Takaful Association ('MTA') and the respondent where the respondent (a) issued its preliminary view that the reinsurance commissions were not income which was taxable as it was a standard commercial discount which represented savings from the premium expenses or Takaful contribution; and (b) it would issue its official viewpoints and decision on the issue after conducting a complete investigation. However, to date, the respondent had not explained on the taxability of the reinsurance and commissions. In the absence of the same, the respondent proceeded to issue its audit findings and decision; (ii) the applicant had been unfairly prejudiced by the respondent's decision which was issued in breach of the applicant's legitimate expectation that the issues concerned were in the midst of negotiation and were by no means concluded; and (iii) the respondent acted against its own preliminary view by subjecting the reinsurance commissions to tax when it was earlier conceded that the same did not constitute income which was taxable.

Held (allowing application):

(1) The applicant had shown that it was adversely affected by the respondent's decision and its judicial review application was not frivolous or vexatious. There was merit in the applicant's case. The question of whether the respondent had acted illegally, in concluding that reinsurance commission and profit commissions received by the applicant constituted income and was subject to tax under s. 60(8) of the ITA, could only be determined at the substantive stage. (paras 30 & 39)

(2) The applicant had an arguable case on whether the respondent had unlawfully attempted to introduce new or extra legal requirements by removing the unit linked funds or had acted illegally and contrary to the wording in s. 110B of the ITA in separating the components of a life policy sold by the applicant under its life business. The present application ought to be allowed as it amounted to exceptional circumstances for judicial review notwithstanding the existence of a domestic appeal process. The threshold at the leave stage was very low and the result of every leave application turned on its own facts based on the test. The present matter clearly demonstrated that leave for judicial review was warranted. The applicant had showed a *prima facie* case that it had exceptional circumstances relating to the respondent's decision. (paras 43-45)

(3) In the instant matter, the issues to be decided in the judicial review had public policy considerations on Malaysia insurance industry as a whole and must be resolved first. Public policy consideration is one of the factors which constitute special circumstances for granting a stay. The balance of convenience laid in the applicant's favour. Apart from the issue of imposition of additional taxes against the requirements of the law, taking into account the current Covid-19 climate and the importance of the insurance industry to the general public, it was essential that these allegations were considered by the court. The applicant should be given all avenues to challenge the respondent's decision. A stay of execution of the decision pending final determination of the judicial review was granted. (paras 52, 54 & 55)

Case(s) referred to:

American International Assurance Co Ltd v. KPDHN (Appeal No. PKCP(R) 15/99) (Unreported) ***(refd)***

AXA Affin Life Insurance Berhad v. KPHDN (Semakan Kehakiman No. WA-25-374-08-2019) (Unreported) ***(refd)***

Bintulu Lumber Development Sdn Bhd v. Director General of Inland Revenue Alpha Pavonis Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (Civil Application No. 01(f)-28-10-2019) (Unreported) ***(refd)***

Chang Shu Hua v. Goon Fook Hong [2008] 3 CLJ 429 CA ***(refd)***

Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] 7 CLJ 487 HC ***(refd)***

Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] 9 CLJ 670 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Nasioncom Holdings Bhd v. Suruhanjaya Sekuriti [2008] 7 CLJ 355 HC ***(refd)***

Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan lnovasi Malaysia & Ors [2013] 3 CLJ 1115 CA ***(refd)***

Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2015] 3 AMR 35 ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 HC ***(refd)***

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 60(8), 110B(1), 113(2)
Rules of Court 2012, O. 53 rr. 2(4), 3(5)

For the applicant - Jason Liang & Anlynn Ng; M/s Wong & Partners
For the Attorney-General - Rohaiza Hamzah; SFC
For the putative respondent - Mohammad Hafidz Ahmad; SRC

Reported by Najib Tamby

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JUDGMENT

Noorin Badaruddin J:

[1] This is the applicant's application seeking leave for judicial review against the decision of the respondent in the form of notices of additional
B assessment dated 25 September 2020 and audit finding letters dated 6 July 2020, 27 August 2020 and 22 September 2020 ("collectively referred to as "decision") requiring the applicant to pay the sum of RM92,553,840.66 as additional taxes and penalties for years of assessment ("YA") 2015, 2016 and 2017.

C **Facts**

[2] The applicant is a public listed company in Malaysia and operates as a licensed insurer under the Financial Services Act 2013 and has been conducting life and general insurance business since 1948. As part of the applicant's business operations as an insurer, the applicant also buys
D insurance policies known as reinsurance from reinsurance companies. By way of the reinsurance agreements, the reinsurance companies agree to assume and undertake, either fully or partially, the risks and liabilities from the applicant in respect of the insurance policies sold by the applicant.

E **[3]** On 3 July 2020 the respondent had conducted an audit review on the applicant.

[4] On 6 July 2020 upon the audit conducted, the respondent had issued its first audit finding in its letter dated 6 July 2020 addressed to the applicant for YA 2015 to 2017. In its audit finding, the respondent found that the
F reinsurance commissions and profit commissions (rebates) received by the applicant from the reinsurance companies constitute income which is subject to tax under s. 60(8) of the Income Tax Act 1967 ("ITA").

[5] In the said letter, the respondent had also requested for sample profit commission agreements, annual profit commission statements and a
G complete list of the profit commission receipts.

[6] On 24 July 2020 the applicant, on the advice of its professional tax consultant and auditor, PricewaterhouseCoopers Taxation Services Sdn Bhd replied to the respondent's letter and provided the explanation.

H **[7]** The respondent then issued its second audit finding letter dated 27 August 2020 and maintained its earlier finding that the profit commissions and reinsurance commissions are subject to tax under s. 60(8) of the ITA. This time around, the respondent's further finding sought to exclude the Unit Linked Funds from the computation of the set-off for tax charged on actuarial surplus under s. 110B of the ITA. The respondent's findings are as follows:
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> potongan tidak sepatutnya dibenarkan tolakan daripada Lebihan Aktuari yang dipindahkan kepada tabung pemegang saham di bawah Seksyen 110B ACP.

penentuan pengiraan Set-off for Tax Charged on Actuarial Surplus berkaitan dengan Investment Linked Funds yang tidak memberi sumbangan ke atas Lebihan Aktuari yang dipindahkan kepada Dana Hayat (tabung insurans nyawa) hendaklah diabaikan.

[8] The applicant, in its response letter dated 10 September 2020, had set out its reasoning *inter alia* as follows:

First issue: Reinsurance commission and profit commission

(i) That profit commission is not taxable under s. 60(8) of the ITA as it is purely an adjustment to cost for reinsurance;

(ii) that profit commission is a rebate given to the applicant when the claim by the insurance policyholder is lesser and the reinsurance premium paid by the applicant is deemed to be paid in excess;

(iii) as such, the relief from expenditure ought not to be assessed as income; and

(iv) the Life Insurance Association of Malaysia ("LIAM") and the Malaysian Takaful Association ("MTA") are still in discussion with the respondent regarding reinsurance commission and profit commission and that these issues remain a hotbed issue affecting the Malaysian insurance industry.

Second issue: The calculation as to the set-off for tax charged on actuarial surplus under s. 110B ITA

(i) For the purpose of deduction under s. 110B ITA, investment link funds bought by an insurance policyholder as life insurance policy ought to be assessed in its entirety;

(ii) that investment linked funds ought not to have been distinguished by the respondent to operating funds and unit linked funds for purposes of calculation under s. 110B ITA; and

(iii) therefore, unit linked funds ought not to have been disqualified by the respondent in the calculation set-off for tax charged on actuarial surplus under s. 110B ITA for investment linked policy sold by the applicant.

[9] On 22 September 2020 the respondent responded to the applicant's letter and maintained their position.

[10] On 25 September 2020 the respondent subsequently issued notice of additional assessment.

[11] The respondent further imposed a 45% penalty on additional income from the profit commission and reinsurance commission received by the applicant based on provision under s. 113(2) of the ITA.

[12] Aggrieved by the decision, the applicant seeks, *inter alia*, the following reliefs and/or orders:

(a) An Order for *certiorari* to remove into this Court for the purpose of it being quashed, the Decision of the respondent for years of assessment 2015, 2016 and 2017 amounting to RM25,049,761.78, RM19,103,682.59, and RM48,400,396.29 (and collectively amounting to, RM92,553,840.66) in additional taxes and penalties for the respective years on the following grounds:

Reinsurance Commission dan Profit Commission

(i) The respondent's Decision is illegal, void, in excess of authority and/or unreasonable when the respondent made adjustments outside of its powers under Section 60(8) of the ITA when the respondent subjected the reinsurance commissions and profit commissions (rebates) received by the applicant from the reinsurance companies as income which is subject to tax under the ITA.

Computation of set-off for tax charged on actuarial surplus under Section 110B of the ITA

(ii) The respondent's Decision is illegal, void, in excess of authority and/or unreasonable when the respondent decided that the Unit Linked Funds should be excluded/removed from the computation of set-off for tax charged on actuarial surplus under Section 110B of the ITA despite the applicant fulfilling the requirements under Section 110B of the ITA because the Unit Linked Funds are in respect of a life business as provided under Section 110B of the ITA, Section 60 of the ITA and Section 2 of the Insurance Act 1996.

(b) A declaration that the respondent has acted *ultra vires* of its power in applying Section 60(8) of the ITA by subjecting the reinsurance commission and profit commission as income which is subject to tax under Section 4(f) of the ITA without reasonable basis.

(c) A declaration that the reinsurance commission and profit commission received by the applicant from the reinsurance companies is not an income which is subject to tax under the ITA.

(d) A declaration that the Unit Linked Funds should not be excluded/removed from the computation of the set-off for tax charged on actuarial surplus as provided under Section 110B of the ITA.

(2) An Order for a stay of all further proceedings and/or steps pertaining to the enforcement or execution of the. respondent's Decision until the final determination of this judicial review by the Court"

(3) Costs of and/or incidental to this application be costs in the cause.

(4) Further, alternative, consequential or other relief which is deemed fit and proper by the court in this circumstance.

The Applicant's Position

[13] The applicant had particularly stressed that the tax treatment of the profit commissions and reinsurance commissions remains a hotbed issue affecting the Malaysian insurance industry which is currently being discussed by LIAM and the MTA with the respondent.

[14] LIAM is a trade association registered under the Societies Act 1966 and represents the interests of 14 life insurance companies in Malaysia (including the applicant) and two life reinsurance companies. By way of letter dated 14 May 2020, LIAM and MTA had, through its professional tax consultants, PricewaterhouseCoopers Taxation Services Malaysia Sdn Bhd wrote to the respondent to explain their position that the profit commissions and reinsurance commissions should not be subject to tax under the ITA.

[15] The applicant reveals that a meeting was held between representatives from LIAM, MTA and the respondent on 18 May 2020.

[16] Subsequently on 30 June 2020, the respondent had issued its preliminary view that the reinsurance commissions (ie, reinsurance discounts) are not income which is subject to tax as it is a standard commercial discount which represents savings from the premium expenses or Takaful contribution. The respondent further stated that it would issue its official viewpoints and decision on the issue after a complete investigation has been undertaken.

[17] According to the applicant, to-date, neither LIAM, MTA nor the applicant had received the respondent's further explanation or decision on the taxability of the reinsurance and commissions. In the absence of the same, the respondent had proceeded to issue its audit findings and notices of additional assessment dated on 25 September 2020, imposing the additional taxes and penalties on the applicant.

[18] In its response letter dated 10 September 2020, the applicant had noted that it had entered into a settlement agreement with the respondent in year 2000 where it was agreed that the profit commission was not taxable. The settlement agreement was acknowledged by the Special Commissioners of Income Tax in the case of *American International Assurance Co Ltd v. KPDHN* (Appeal No. PKCP(R) 15/99).

[19] The applicant submits that it has been unfairly prejudiced by the respondent's decision which was issued in breach of the applicant's legitimate expectation that the issues concerned were in the midst of negotiation and were by no means concluded.

[20] The applicant further submits that the respondent's unreasonableness is amplified when it had acted against its own preliminary view by subjecting the reinsurance commissions to tax when it was earlier conceded that the same do not constitute income which is taxable.

[21] It is therefore pleaded that the applicant is aggrieved and adversely affected by the decision of the respondent and that the decision is infirmed by illegality, unreasonableness and is in excess of the respondent's authority.

Summary Of The Attorney-General's And The Putative Respondent's Submissions

[22] The Attorney General and the Director General of Income Tax ("DGIR") (the latter, having been invited to appear as putative respondent herein) object to this instant application.

[23] The DGIR takes the position that the reinsurance commission and profit commission have been added back as taxable income to the taxpayer and exclusion of the unit linked funds from the calculation under s. 110B of the ITA set-off for tax charged on actuarial surplus.

[24] It is submitted on behalf of the DGIR that whether the reinsurance commissions, profit commissions, computation of the set-off for tax charged on actuarial surplus constitute income or otherwise should be decided based on the fact surrounding the transaction and should be ventilated before the Special Commissioner of Income Tax ("SCIT") and not the court.

[25] It is further argued that the DGIR had acted within the four corners of the ITA in raising the additional assessment against the applicant and that the applicant had failed to show special circumstances that warrant leave to be granted. It is asserted that as the issues raised herein are all fact-based, and as the applicant had filed the Form Q, the applicant ought to have exhausted its right to appeal before the SCIT.

[26] In addition, the DGIR submits that the issues raised by the applicant herein are no longer considered as novel as the issues have been raised in court in the case of *AXA Affin Life Insurance Berhad v. KPHDN* (Semakan Kehakiman No. WA-25-374-08-2019) where judicial review was denied in that matter by the High Court.

Findings

[27] The test in granting leave for judicial review has been canvassed in plethora of case law. In relation to tax cases, summarily what the applicant needs to show is that it is adversely affected with the decision and that there exist exceptional circumstances ie, illegality or excess of jurisdiction, breach of natural justice, failure to perform some statutory duty on the part of the respondent. At this low threshold stage, the court must refrain from embarking on the merit or the substantive argument of the case. Leave may be granted if the application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome (see *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296).

[28] The Attorney General and DGIR had repeated the incantation of the alternative remedies which must be exhausted before recourse may be had to judicial review. That is the crux of the objection raised by them. Nevertheless, the Federal Court after examining in detail the alternative remedy argument in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 observed as follows:

> ... the courts are often much kinder to the applicant with a good case on the merits, who is faced with this hurdle to clear and will most probably entertain his application as an exception.
>
> (...)
>
> Professor Wade reckons – and we respectfully agree – that the reality of the matter is that: when genuine grounds for Judicial Review are alleged, it is the refusal rather than the grant of relief which is the exceptional course (see 7th Ed, Wade and Forsyth, *Judicial Review of Administrative Action* p 725).

[29] It must be taken as trite by now that case law has established that the courts' jurisdiction to hear a judicial review application is not excluded despite the existence of a statutory appeal remedy under the ITA when the application shows strong merit. The courts are inclined to grant judicial review more so when the threshold for granting of leave for judicial review is very low and *prima facie* has been shown that the application is not frivolous or vexatious.

[30] Firstly, it is the finding of this court that the applicant has shown that it is adversely affected by the decision of the respondent and its judicial review application is not frivolous or vexatious. Order 53 r. 2(4) of the Rules of Court 2012 provides that:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[31] In *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35, the Court of Appeal stated as follows:

> It is trite that the "leave" proceedings are intended to sieve out unwanted or frivolous applications before it moves to the substantive stage of proceedings. The assistance required by the court from the Attorney-General's Chambers at this stage, in that context, was to appraise the court of any particular features of the case that would disqualify any leave being granted to the applicant concerned. It was not for the Chambers at this preliminary stage, in my view, to embark upon substantive submission on the jurisdiction of the court to entertain such an application.

[32] The Court of Appeal further stated that:

> If the applicant can *prima facie* satisfy that he is a person affected by a decision of a *quasi*-judicial or administrative nature or made by a public body, the simple question that the court should ask is only this – Why should leave not be granted?

[33] The DGIR produced numerous case law where leave for judicial review was denied and had selectively applied the principles discerned from the plethora of case law such as the Federal Court's decision in *Bintulu Lumber Development Sdn Bhd v. Director General of Inland Revenue Alpha Pavonis Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (Civil Application No. 01(f)-28-10-2019) where the taxpayer's appeal for leave was dismissed on the ground *inter alia* that the appellant/taxpayer ought to have resort to the appeal process before the SCIT. However, it is pertinent to note that the Federal Court in that case did not overrule or modify the test to be applied at the leave stage. It remains the case that the threshold at the leave stage is very low and the result of every leave application turns on its own facts based on the test ie, that the applicant is adversely affected by the decision of a *quasi*-judicial or administrative nature or made by a public body, and the applicant has a *prima facie* arguable case. Once the applicant has met the threshold, an alternative remedy argument does not bar the court from granting leave for judicial review.

[34] The Federal Court in *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 56 at para. 91 of the report had stated as follows:

> Guided by those persuasive cases, judicial interference therefore should be on a case by case basis.

[35] It must be noted further that the line of authorities has demonstrated that the existence of an alternative remedy is an argument that should be canvassed at the substantive stage. This position can be seen in the judgment of the High Court in *Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] 7 CLJ 487; [2018] MLJU 590 where the High Court stated as follows:

> Thus, I accept the learned applicant's counsel's submission that when the pronouncement of the Federal Court in Alcatel-Lucent is read together with the *ratio decidendi* in *Chin Mee Keong* and *QSR Brands Bhd*, the availability or non-availability of an alternative remedy is irrelevant at the leave stage and should be raised at the merits stage. The existence or non-existence of a sufficient alternative remedy is something that should be canvassed at the substantive stage and is therefore a premature objection to be raised now at the leave stage.

[36] On the ongoing discussions on the income tax treatment, the applicant has averred that LIAM and the MTA have been in continuous discussions with the respondent about the tax treatment in relation to profit commissions and reinsurance commissions which has been affecting the insurers in Malaysia. A meeting was stated to have been held between representatives from LIAM, MTA and the respondent on 18 May 2020. According to the applicant, on 30 June 2020, the respondent had issued its preliminary view that the reinsurance commission (ie, reinsurance discounts) are not income which is subject to tax as it is a standard commercial discount which represents savings from the premium expenses or Takaful contribution. It is further averred that the respondent had stated that an official viewpoint and its decision on the issue will be given after a complete investigation has been undertaken. However, the respondent did not provide further explanation on the taxability of the reinsurance and commissions. Instead, it proceeded to issue its audit findings and notices of additional assessment dated 25 September 2020 against the applicant based on tax treatments contrary to the viewpoints that were represented to LIAM.

[37] The applicant is now saying that it has been unfairly prejudiced by the respondent's decision which is contended to be issued in breach of its legitimate expectation that the issues concerned were in the midst of negotiation and were by no means concluded.

[38] It is further averred that there was a settlement agreement reached between the applicant and the respondent, in year 2000, which provided that the profit commissions are not taxable. It appears that the respondent has failed to take this into account in its decision-making process. This settlement agreement was recorded by the Special Commissioners of Income Tax in the case of *American International Assurance Co Ltd v. KPDHN* (Appeal No. PKCP(R) 15/99).

[39] It is of the considered view that there is merit in the applicant's case herein. The question of whether the respondent had acted illegally in concluding that reinsurance commission and profit commission received by the applicant constitute income and subject to tax under s. 60(8) of the ITA can only be determined at the substantive stage.

[40] On the issue of the computation of the set-off for tax charged on actuarial surplus under s. 110B of the ITA, the applicant contends that the respondent had acted illegally in the computation of the set-off for tax charged on actuarial surplus under s. 110B of the ITA.

[41] It has been highlighted that an investment linked policy is sold as one life policy in its entirety. Under the policy, the policyholders are entitled to life insurance benefits and, at the same time, are able to generate investment returns from the premiums paid to the applicant. As such, the premiums paid by the policyholders are directly applied into both components; the operating funds and unit linked funds.

[42] It is the applicant's position that the respondent's decisions had sought to legislate or add extra requirements that are not provided under the law. According to the applicant, s. 110B of the ITA applies to all life business, irrespective of the manner in which the life business is undertaken. The investment linked policy is a life policy sold under the applicant's life business. Hence, the applicant argues that the respondent cannot exclude the unit linked funds from the computation of the set-off for tax charged on actuarial surplus under s. 110B of the ITA as this is illegal for it contravenes the express provisions of the law. It is further argued that s. 110B(1) of the ITA, as prescribed by the Minister of Finance does not state that the unit linked funds are to be excluded or removed from the said computation.

[43] This court finds that the applicant has an arguable case on whether the respondent had unlawfully attempted to introduce new or extra-legal requirements by removing the unit linked funds or had acted illegally and contrary to the wording of s. 110B of the ITA in separating the components of a life policy sold by the applicant under its life business.

[44] On the issues raised and as stated in the above, it is of the considered view that the court ought to allow the present application as they amount to exceptional circumstances for judicial review notwithstanding the existence of a domestic appeal process. It cannot be said that the issues raised are frivolous or vexatious.

[45] It remains the case that the threshold at the leave stage is very low and the result of every leave application turns on its own facts based on the test. The facts of the present matter clearly demonstrate that leave for judicial review is warranted. The applicant has shown a *prima facie* case that it has exceptional circumstances relating to the decision.

Stay

[46] It has been established that a decision made by a public decision-making body could be stayed by an order of the court pending judicial review of the decision. Order 53 r. 3(5) Rules of Court 2012 provides that:

> (5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

[47] The High Court in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210 had held:

> The phrase 'a stay of the proceedings' must have a wider application. It does not confine to proceedings in a court only. Today, many applications for judicial review are for orders of *certiorari* to quash decisions of decision-making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus the phrase 'a stay of the proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged

has been reached, including the decision itself.' ... Thus, as had been decided in *Ex parte Avon County Council*, a decision made by an officer or minister of the crown as well as other relevant decision-making bodies can, in principle, be stayed by an order of the court. That the court should have the power to order a stay of a decision of a decision-making body pending the conclusion of a challenge to the decision-making process by way of judicial review.

[48] In determining whether a stay of the decision ought to be granted in judicial review proceedings, the special circumstances test as laid out by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 applies. In *Nasioncom Holdings Bhd v. Suruhanjaya Sekuriti* [2008] 7 CLJ 355; [2008] 4 MLJ 620, the court held:

[16] It is trite that the grant of leave in judicial review proceedings is an exercise of the court's discretion and consequently pursuant to O. 53 r. 3(5) of the RHC which states, 'The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question' is likewise discretionary.

[49] The Court of Appeal in *Chang Shu Hua v. Goon Fook Hong* [2008] 3 CLJ 429 acknowledged that the category of what constitutes special circumstances is not closed, and ought to be interpreted flexibly. The court stated the followings:

[34] Other factors must be taken into account in applying the special circumstances approach. These factors, and they are not exhaustive, may be listed as follows:

(a) whether damages would be an adequate remedy if the applicant who applies for the stay succeeds in his appeal?

(b) the public policy consideration that has to be taken into account;

(c) the need to examine the subject matter of the appeal;

(d) the need to weigh in a balance of the hardship of the parties involved;

(e) the delay in filing the application for a stay;

(f) whether the court would exercise its inherent jurisdiction to grant the stay; and

(g) where would the balance of convenience or the balance of justice lie?

[50] In *Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] 9 CLJ 670, the High Court observed the difference between a stay of execution of a decision of a public body and a stay of execution of a judgment of a court. The observation of the court are as follows:

A [28] It must be noted that a stay of the proceedings as in a suspension of a unilateral *ex parte* decision of an administrative decision maker is drastically different thing from a stay of execution of a judgment of a court of law after a full blown trial and a determination on the merits have been made *inter partes*. An attempt to equate the two processes would be inappropriate.

B [29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the 1st respondent from acting on the Impugned Decision dated 21 January 2010, the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the C balance of equities tips in its favour, and that a stay and/or prohibition order is in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant.

[51] The Court of Appeal in the judicial review case of *Tan Bun Teet & Ors* D *v. Menteri Sains, Teknologi Dan lnovasi Malaysia & Ors* [2013] 3 CLJ 1115 later confirmed the principles enunciated in *Godfrey Phillips* (*supra*).

[52] It is obvious that in the instant matter, the issues to be decided in the judicial review have public policy considerations on Malaysia's insurance industry as a whole and must be resolved first. The applicant has stated that E the respondent *via* its assessing division had essentially issued its decision without further reference to the applicant or the 14 life insurance companies, two reinsurance companies and 18 Islamic insurance providers in Malaysia collectively represented by both LIAM and MTA.

[53] It is highlighted to the court that the taxability of the profit F commissions and reinsurance commissions is a prevalent issue affecting all conventional and Islamic insurance providers in Malaysia, as the providers receive these commissions in the usual course of their businesses and that the decision made by the respondent as to the taxability of the same would have a significant impact on the insurance industry in this country. As a G consequence, the policyholders of these insurance companies, of whom most are Malaysian citizens and companies, would be equally impacted. It is further pointed out that the public importance vests in the issue is further compounded by the fact that the concepts of profit commissions and reinsurance commissions have long been in existence in the insurance H industry in Malaysia and their taxability had never been challenged.

[54] Public policy consideration is one of the factors which constitute special circumstances for granting a stay. The balance of convenience lies in the applicant's favour. Apart from the issue of imposition of additional taxes against the requirements of the law, this court noted and agreed with the I submission by learned counsel for the applicant that taking into account the

current COVID-19 climate and the importance of the insurance industry to the general public, it is essential that these allegations are considered by the court. The applicant should be given all avenues to challenge the decision of the respondent.

[55] It is of the considered view that the respondent will not be prejudiced in any way by any temporary stay granted against the decision. In the event the respondent's assessment is found to be correct, the final outcome would be monetary in nature, ie, payment of the taxes and the respondent retains full right to institute proceedings for debt recovery against the applicant or issue notices of additional assessments against the applicant. The applicant on the other hand will be affected as its ability to serve its clients in the current health-sensitive environment would be severely hampered. The consequence is not limited to monetary impact, but the health and safety of policyholders. Balance of convenience tilts decisively towards the applicant. A stay of execution of the decision pending final determination of the judicial review was therefore granted.

Conclusion

[56] Premised on the above, this court granted order in terms of encl. 1.